Supreme Court, U.S.
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No. 89 - 940

In the Supreme Court of the United States

October Term, 1989

PAULA MEIER, individually, and as guardian ad litem for Shannon Ann Meier and Kristen Jeanne Meier; and PAULA MEIER, on behalf of the Estate of JAMES R. MEIER, Deceased,

Petitioners,

v.

NISSAN MOTOR CORPORATION IN U.S.A., NISSAN MOTOR COMPANY, LTD., and OXNARD NISSAN,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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40 pp

QUESTIONS PRESENTED

1. Do the National Traffic and Motor Vehicle Safety Act (the "Safety Act") (15 U.S.C. section 1381, *et seq.*) and the Federal Motor Vehicle Safety Standard (the "FMVSS") 208 (49 C.F.R. section 571.208) impliedly preempt any state common law claim that an automobile is defective because it is equipped with one restraint system option expressly allowed by federal law, seatbelts (instead of another allowed option, air bags), as the First, Tenth, and Eleventh Circuits,[1] as well as various state courts (including the California courts in this case), have held?

2. Is a state court's construction of its own summary judgment statute and related procedural statutes and rules, as to what constitutes timely service of notice, a proper issue for review by this Court, or should this Court respect the state court's determination of the issue?

[1]To date the First, Tenth, and Eleventh Circuits are the only federal circuits which have considered and ruled upon the precise question presented to this Court. As discussed below, all of these courts reached the same conclusion, which was that such state claims are impliedly preempted by federal law, and petitions for writs of certiorari in each of these cases are currently pending before this Court.

Rule 28.1 Statement

Nissan Motor Corporation in U.S.A., Inc., is a wholly owned subsidiary of Nissan Motor Company, Ltd. All subsidiaries of Nissan Motor Corporation in U.S.A., Inc., and Nissan Motor Company, Ltd., in the United States are wholly owned except for the following:

Arizona Test Center, Inc.
Barrett Industrial Trucks, Inc.
Distribution and Auto Service, Inc.
Nihon Radiator
Nissan CR Corporation
Nissan Diesel America, Inc.
Nissan Diesel Motor Co., Ltd.
Nissan Motor Acceptance Corporation
Nissan Motor Aceptance Corporation Holdings, Inc.
Nissan Motor Manufacturing Corporation U.S.A.
Nissan Research & Development, Inc.

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OPINION BELOW AND RELATED CASES

As noted by petitioners, the opinion of the California Court of Appeal is reported as *Nissan Motor Corp. in U.S.A. v. Superior Court*, 212 Cal.App.3d 980, 261 Cal.Rptr. 80 (1989). (Petition, pp. 1a-6a.)

A copy of the trial court's minute order, entered January 23, 1989, denying the respondents' motion for partial summary adjudication of the air bag issue is annexed as Appendix A to this brief in opposition.

There are three related cases, *Wood v. General Motors Corporation*, 865 F.2d 395 (1st Cir. 1988), *cert. pending*, No. 89-46, *Kitts v. General Motors Corporation*, 875 F.2d 787 (10th Cir. 1989), *cert. pending*, No. 89-279, and *Taylor v. General Motors Corporation*, 875 F.2d 816 (11th Cir. 1989), *cert. pending*, No. 89-852, currently before this court on petitions for writs of certiorari. These are the only federal circuit decisions which have considered the precise issue before this court, and all have held that "no air bag" claims are impliedly preempted by federal law.

The *Wood* case was expressly relied upon by the California Court of Appeal in reaching its conclusion that the "no air bag" aspect of the petitioners' state law claims was preempted by federal law. The *Kitts* case also expressly embraced the *Wood* decision in reaching its conclusion of implied preemption. The *Taylor* case, while reaching the same conclusion as the *Wood* case as to implied preemption, employed a slightly different analysis.

JURISDICTION

While the current petition for writ of certiorari was timely filed in this court, the respondents contend that this court lacks jurisdiction to consider the petition because the order of which review is sought is not a "final judgment" as that term has been construed in 28 U.S.C. section 1257(a).

STATUTES AND REGULATIONS

Since respondents contend that jurisdiction is lacking in this Court, the principal statutory guideline is provided by 28 U.S.C. section 1257(a):

"Final judgments or decrees rendered by the

> highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

The key question in the petition involves Article VI, clause 2, of the United States Constitution ("Supremacy Clause"):

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the constitution or Laws of any state to the Contrary notwithstanding."

The petition sets forth sections 1392(d) and 1397(c) of the National Traffic and Motor Vehicle Safety Act of 1966 (the "Safety Act") and Federal Motor Vehicle Safety Standard (the "FMVSS") 208, 49 C.F.R. section 571.208. (Petition, pp. 2-3; App., pp. 8a-10a.) The complete text of section 1391(2) of the Safety Act is as follows:

> "'Motor Vehicle Safety Standards' means a minimum standard for motor vehicle performance, or motor vehicle equipment perfor-

mance, which is practicable, which meets the need for motor vehicle safety and which provides objective criteria."

Section 1392(a) provides:

"The Secretary shall establish by order appropriate Federal Motor Vehicle Safety Standards. Each such Federal Motor Vehicle Safety Standard shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms."

The 1974 Amendment to the Safety Act, as codified in 15 U.S.C. section 1410b, provides as follows:

"§1410b. Occupant Restraint Systems:

(a) Amendment of Federal Motor Vehicle Safety Standard number 208; effective date. Not later than 60 days after the date of enactment of this section, the Secretary shall amend the Federal Motor Vehicle Safety Standard into conformity with the requirements of paragraphs (1), (2), and (3) of subsection (b) of this section. Such amendment shall take effect no later than 120 days after the date of the enactment of this section.

"(b) Federal Motor Vehicle Standard requirements. After the effective date of the amendment prescribed under subsection (a):

"(1) . . .

"(2) Except as otherwise provided in paragraph (3), no Federal Motor Vehicle Safety Standard respecting occupant

restraint systems may—

(A) have the effect of requiring, or

(B) provide that a manufacturer is permitted to comply with such standard by means of, an occupant restraint system other than a belt system.

"3. . . .

(A) . . .

(B) paragraph (2) shall not apply to any Federal Motor Vehicle Safety Standard which the Secretary elects to promulgate in accordance with the procedure specified in subsection (c), unless it is disapproved by both Houses of Congress by concurrent resolution in accordance with subsection (d). . . .

The petition sets forth the provisions of section 437c(1) of the California *Code of Civil Procedure*. (Petition, p. 3.) Rule 309 of the California *Rules of Court*, which is entitled "Notice of the termination of submitted matters," provides, in pertinent part, as follows:

"When the court rules on a demurrer or motion or makes an order or renders a judgment in a matter it has taken under submission, the clerk shall forthwith notify the parties of the ruling, order or judgment. The notification, which shall specifically identify the matter ruled upon, may be given by mailing the parties a copy of the ruling, order or judgment, and it shall constitute service of notice only if the clerk is required to give notice pursuant to Code of Civil Procedure section 664.5. The failure of the clerk to give notification shall not extend the time provided by law for performing any

act except as provided in rule 2(a) or rule 122(a)."

California *Code of Civil Procedure*section 664.5, which is entitled "Notice of entry of judgment," provides as follows:

"(a) In any contested action or special proceeding in a superior court, other than a proceeding for voidable marriage pursuant to the Family Law Act (Title 2 (commencing with Section 4400) or dissolution of marriage, legal separation and summary dissolution pursuant to Title 3 (commencing with Section 4500) of the Civil Code) the party submitting an order or judgment for entry shall prepare and mail a copy of the notice of entry of judgment to all parties who have appeared in the action or proceeding and shall file with the court the original notice of entry of judgment together with the proof of service by mail.

"(b) Promptly upon entry of judgment in a contested action or special proceeding in a municipal or justice court, the clerk of the court shall mail notice of entry of judgment to all parties who have appeared in the action or special proceeding and shall execute a certificate of such mailing and place it in the court's file in the cause.

"(c) For purposes of this section, 'judgment' includes any judgment, decree, or signed order from which an appeal lies.

"Upon order of the court in any action or special proceeding, the clerk shall mail notice of entry of any judgment or ruling, whether

or not appealable."

California *Code of Civil Procedure*section 1013a entitled "Service by mail; Proof," provides in pertinent part as follows:

. . .

> "(4) In case of service by the clerk of a court of record, a certificate by that clerk setting forth the exact title of the document served and filed in the cause, showing the name of the clerk and the name of the court of which he or she is the clerk, and that he or she is not a party to the cause, and showing the date and place of deposit in the mail, the name and address of the person served as shown on the envelope, and also showing that the envelope was sealed and deposited in the mail with the postage thereon fully prepaid."

INTRODUCTION

The California Court of Appeal has recognized the unique regulatory impact of air bag claims and the weighty policy considerations underlying the Safety Act and FMVSS 208 by following the only three federal circuit courts which have decided the air bag preemption issue, and has concluded that such claims are preempted by federal law. *See, Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), *cert pending*, No. 89-852; *Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), *cert pending*, No. 89-279; *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), *cert pending*, No. 89-46. The petitioners in this matter, and in the three other petitions before this Court, have failed to demonstrate that these decisions conflict with decisions of this Court, other federal courts of appeals, or with

those of any state court of last resort. *See*, Rule 17, *Rules of the Supreme Court of the United States*. Thus, there is no reason for this Court to grant the petitions involving the same issue which this Court declined to review last Term. *Wickstrom v. Maplewood Toyota, Inc.*, 416 N.W.2d 838 (Minn. App. 1987), *cert. denied*, _____ U.S. _____, 108 S.Ct. 2905 (1988).

As an additional consideration, the petitioners herein seek review of an interlocutory order of the state court below which does not consitute a "final judgment" within the scope of 28 U.S.C. 1257(a), and therefore this Court lacks jurisdiction to consider the petition. Consequently, the petition should be denied.

STATEMENT OF THE CASE

Petitioner Paula Meier's husband, James R. Meier, was killed in a car accident on November 17, 1985, while driving a 1982 Nissan Stanza automobile distributed by Nissan Motor Corporation in U.S.A. The vehicle was equipped with three point seat belts authorized by federal regulation in effect at the time of manufacture and at the time of the accident. *See*, 49 C.F.R. section 571.208.[2] The petitioners sought recovery against Nissan based on claims of negligence, product defect, and breach of warranty. The claims were premised on the theories that the occupant restraint system installed in the automobile failed to restrain the decedent, and that the vehicle was not equipped with air bags.

On December 2, 1988, respondents filed a motion for

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[2]Nissan adopts the legislative and regulatory history of the Safety Act and FMVSS 208 contained in the General Motors Corporation Brief in Opposition to the Petition for Writ of Certiorari in *Wood*, No. 89-46, at pp. 3-11.

partial summary adjudication of the issue that petitioners' theory of product defect based on the absence of an air bag was preempted by federal law.

On January 23, 1989, by minute order, the Superior Court of the State of California for the County of Los Angeles denied the respondents' motion. Appendix A. No notice was ever served by the petitioners as they were directed to do by the court.

On March 24, 1989, respondents filed a petition for writ of mandate in the Court of Appeal of the State of California, Second Appellate District. The appellate court issued its original unpublished opinion on May 26, 1989, and, relying on *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), the court determined that the petitioners' "no air bag" claim was preempted by federal law.

On June 22, 1989, the Court of Appeal modified and certified its decision for publication.

On August 31, 1989, the California Supreme Court denied the petitioners' petition for review.

ARGUMENT

I.

Under the Circumstances of the Present Case, There is No Jurisdiction in This Court Because the State Court's Order That Petitioners' "No Air Bag" Claim is Preempted by Federal Law is Not a Final Judgment Within the Meaning of 28 U.S.C. Section 1257(a).

By the express provisions of 28 U.S.C. section 1257(a), this Court is one of limited jurisdiction. By the enactment of that section, Congress has imposed the restriction upon this Court that it may only review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." The critical interests of efficiency, judicial restraint, and federalism clearly underlie the congressional postponement of direct review by this Court. *See, e.g., Local No. 438 Const. and General Laborers' Union, AFL-CIO v. Curry*, 371 U.S. 542, 550, 83 S.Ct. 531, 536 (1963); *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124, 65 S.Ct. 1475, 1478 (1945). Furthermore, this court itself has consistently applied a strict test of finality to ascertain whether state court decisions, remanding cases for further proceedings, or in cases where further substantial state court proceedings remain, should be reviewed. *See, O'Dell v. Espinoza*, 456 U.S. 430, 102 S.Ct. 1865 (1982); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 98 S.Ct. 2454 (1978). This court has recognized that an important purpose of the finality requirement is to prevent interference with state court proceedings when the underlying dispute may be otherwise resolved. *Costarelli v. Massachusetts*, 421 U.S. 193, 95 S.Ct. 1534 (1975). It is only in very limited circumstances where this court

will depart from the rule of strict finality and treat a state court judgment as final even though state court proceedings are not yet complete.

In *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029 (1975), this Court recognized four limited exceptions to the general principle that it may not review cases in which further proceedings are anticipated in state courts. Of these, only one has any potential application here. As the *Cox* court set forth:

> "Lastly, there are those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceeding still to come. In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation." 420 U.S. at 482-483, 95 S.Ct. at 1040.

Petitioners may argue there has been a final determination of the federal question here when the state Court of Appeal determined that the petitioners' "no air bag" claim was preempted by federal law. However, since this issue represents only one aspect of petitioners'

state law claims as to product defect and breach of warranty, it is clear that reversal of the state court on the federal issue would not be preclusive of any further litigation. To the contrary, the trial of the petitioners' various claims of product defect and breach of warranty is currently scheduled to go forward in state court on or about March 19, 1990, and the determination of the preemption question merely controls the nature and character of certain evidence in those proceedings to come.

Certainly, if defendants and respondents herein prevail in the state court proceedings, the plaintiffs and petitioners may appeal from the judgment, and take that appeal as far as they wish. On the other hand, if the petitioners prevail below, there would be neither need for appeal by them, nor necessity for any review by this Court, as the litigation would have been resolved based purely on state law. The California Court of Appeal's conclusion to follow well-reasoned federal authority in determining the preemption of one aspect of petitioners' case simply does not warrant interference by this Court in the state court proceedings. Any such review by this Court at this time would be premature.

II.

Absent Any Constitutional Infirmity, a State Court's Decision to Consider a Petition for a Writ of Mandate Based on its Construction of its Own Statutes and Procedural Rules Does Not Provide Any Independent Basis for the Jurisdiction of This Court.

Petitioners make the same argument to this Court regarding timeliness of respondents' request for relief which they made unsuccessfully in both state courts below. It was rejected in the state courts and must be

rejected here. An examination of 28 U.S.C. section 1257(a), and rule 17 of the *Rules of the Supreme Court of the United States*, demonstrates that this "timeliness" issue provides neither a basis for this Court's jurisdiction, nor a valid consideration in influencing this Court's discretion as to whether to consider the petition in the first instance.

Petitioners contend that the respondents' petition for writ of mandate in the Court of Appeal below was not timely filed because it was filed more than ten days after the trial court denied the respondents' motion for summary adjudication of issues. However, the respondents contended that their mandate petition was timely filed because there was no formal service of the notice of the ruling as required by the court's minute order, and as required by the California *Code of Civil Procedure* and *Rules of Court*. The Court of Appeal in *Nissan Motor Corp. in U.S.A. v. Superior Court*, 212 Cal.App.3d 980, 262 Cal.Rptr 80 (1989), apparently agreed with the respondents' contention by accepting, and subsequently granting, the petition for writ of mandate, and this Court should respect that determination.

An analysis of rule 309 of the California *Rules of Court*, and California *Code of Civil Procedure* sections 437c(l), 664.5, and 1013a, amply demonstrates the implied determination of the appellate court that there was no "service of written notice" in this case as required by those provisions. Furthermore, on the face of the order in question, specific direction was given that the petitioners (plaintiffs and responding parties in the trial court) were to give notice of the ruling, and that notice was never given. Consequently, contrary to the petitioners' lament, the court below determined by

implication that the request was timely by considering the respondents' request for a writ of mandate. As a final consideration, it should be noted that, pursuant to California *Code of Civil Procedure* section 1008(b), the respondents were free to renew their motion for summary adjudication at any time, and most likely would have, given the additional decisions in *Kitts* and *Taylor*, which were rendered subsequent to the trial court's determination.

In *Okuda v. Superior Court*, 144 Cal.App.3d 135, 138 (1983), a California appellate court applied a similar analysis to a petition for writ of mandate in a lis pendens context under *Code of Civil Procedure* section 409.4, and concluded that a contention of untimeliness was "meritless." In like fashion, the Court of Appeal below apparently rejected the petitioners' untimeliness claim out of hand by omitting any reference to it in its opinion. Similarly, by implication, the California Supreme Court considered the claim to be inconsequential. The mere fact that other Courts of Appeal may have construed rule 309 and *Code of Civil Procedure* sections 437c(l) and 664.5 differently under different circumstances is of no moment. In those cases, there were apparently sworn declarations of service by the court clerk. Those decisions were both nonbinding on the Court of Appeal below, and provide no basis in law for assumption of jurisdiction by this Court.

III.

The State Court Determination of Preemption Below Does Not Conflict with Decisions in the United States Circuit Courts of Appeal, Does Not Conflict With Decisions of Any Other State Court of Last Resort, and Does Not Conflict With Any Other Decisions by This Court.

The argument in the petition (pp. 10-14) that several circuit courts of appeals have found that the Safety Act was not intended to preclude common law claims is simply erroneous. The decision of the California Court of Appeal is in accord with the decisions of the First Circuit in *Wood*, the Tenth Circuit in *Kitts*, and the Eleventh Circuit in *Taylor* which have reached the same conclusion as to preemption. The cases cited in the petition, *see, e.g., Knippen v. Ford Motor Co.*, 546 F.2d 993, 1000 (D.C. Cir. 1976); *Dawson v. Chrysler Corp.*, 630 F.2d 950, 957-958 (3rd Cir. 1980), *cert. denied*, 450 U.S. 959 (1981), merely hold that compliance with federal safety standards is relevant but not conclusive on the merits of a design defect claim. As the *Wood* court expressly recognized:

> "Not a single appellate decision addressed the question of the implied preemption of a state law cause of action *that would effectively create a state standard, not identical to a federal standard in violation of section 1392(d).*
>
> "Instead, the cited cases hold that compliance with a federal safety standard does not serve as a defense on the *merits* of a defective design claim." (Emphasis in original.) 865 F.2d at 417.

Wood was the first appellate decision to consider the concept of implied preemption of a state cause of action

because it creates a nonidentical state standard in violation of 15 U.S.C. section 1392(d), and to distinguish such preemption from the raising of a FMVSS as a defense to a design defect claim. Implied preemption analysis involves a finding not of compliance, but of a conflict between state and federal law. *See, Wood v. General Motors Corp.*, 865 F.2d at 417-18; *Staggs v. Chrysler Corp.*, 678 F.Supp. 270, 272 (N.D. Ga. 1987). None of the cases cited by petitioners involve a federal design standard similar to FMVSS 208, and none involved a direct conflict between a federal standard and a state common law design defect claim. Although no state court of last resort has resolved the air bag preemption issue, at least three state intermediate appellate courts addressing the issue have also found these claims preempted, including the appellate court below. *See, Nissan Motor Corp. in U.S.A. v. Superior Court*, 212 Cal.App.3d 980, 261 Cal.Rptr. 80 (Cal.App. 1989); *Gardner v. Honda Motor Co.*, 145 A.D.2d 41, 536 N.Y.S.2d 303 (N.Y.A.D. 1988), *appeal dismissed*, 74 N.Y. 2d 715, 543 N.Y.S.2d 401, 541 N.E.2d 430 (1989); *Wickstrom v. Maplewood Toyota, Inc.*, 416 N.W.2d 838 (Minn.App. 1987), *cert. denied*, _____ U.S. _____, 108 S.Ct 2905 (1988). A fourth intermediate court which recently considered the issue determined that such a claim was not preempted. *Gingold v. Audi-NSU-Auto Union, A.G.*, 567 A.2d 312 (Pa.Super. 1989), application for rehearing *en banc* pending. It should be noted, however, that the *Gingold* decision is not final in the Commonwealth of Pennsylvania because it is subject to either potential vacatur upon *en banc* consideration by the Superior Court of Pennsylvania, or reversal upon discretionary review by the Supreme Court of Pennsylvania. Furthermore, the *Gingold* decision is an aberration of law especially because of its unsupported

views that common law tort claims do not have regulatory impact and that implied preemption analysis may never be undertaken in the presence of a general savings clause. Such conclusions are completely contrary to those of the other six appellate courts which have considered the issue.

The petitioners contend that *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251, 104 S.Ct. 615 (1984), stands for the proposition that preemption "is applied in situations where a federal regulatory scheme is substituted for those of individual states," and that "the federal regulatory scheme generally contains its own rights and remedies." Petition, p. 16. *Silkwood* not only is inapplicable to the issue presented here, but its holding has been severely mischaracterized. *See, Wood v. General Motors Corp.*, 865 F.2d at 411-12. The issue in *Silkwood* was whether punitive damages were recoverable under the Price-Anderson Act; the plaintiff's entitlement to compensatory damages was undisputed. The "tension" which this Court referred to was that created by the interface between two very different concepts: (1) the fact that this Court had recently established that federal regulations occupied the field of nuclear safety, *see, Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 212, 103 S.Ct. 1713 (1983), and (2) the fact that Congress had enacted the Price-Anderson Act, 42 U.S.C. section 2011, 2210, (1982), limiting the aggregate liability for accidents at nuclear facilities. *Silkwood*, 464 U.S. at 256. The very existence of a scheme where the government would indemnify operators of nuclear facilities strongly evidenced a congressional intent to allow common law actions for damages. *See, Wood*, 865 F.2d at 411. This Court ruled that the recovery of punitive damages was not preempted

by the Price-Anderson Act, and also recognized that state common law actions would be preempted if the actions "would frustrate the objectives of the federal law." 464 U.S. at 256. Yet, under the circumstances in *Silkwood*, the Court perceived no conflict.

On the other hand, there is no evidence whatsoever that, by enacting the Safety Act, Congress intended to preserve conflicting state tort claims or that there is a "tension" similar to that involved in *Silkwood* which Congress intended to accept. *See, Wood*, 865 F.2d at 412. The petitioners suggest absolutely no reason why Congress would encourage regulation by jury verdict in a manner totally inconsistent with the federal regulatory scheme. The fact that FMVSS 208 is a precisely drawn, carefully considered "design" standard sanctioned by statute, 15 U.S.C. section 1410b(a)-(b), belies any notion that Congress would find conflicting state-created design standards an acceptable form of "tension."

The decision below, relying on the unanimous decisions of the federal circuits, does not conflict with *Silkwood*, or any other decision of this Court.

Based on the foregoing, and an examination of rule 17 of the *Rules of the Supreme Court of the United States*, review by grant of certiorari would not be a proper exercise of this Court's discretion.

IV.

The Court of Appeal Below Was Properly "Persuaded" by the Wood Decision That "No Air Bag" Claims Are Impliedly Preempted by Federal Law, and the Same Conclusion by Two Other Circuit Courts of Appeals Reinforces the Correctness of the Conclusion.

As noted above, *Wood* was the first appellate decision to deal with the concept of implied preemption of a state cause of action because it created a nonidentical state standard in violation of 15 U.S.C. section 1392(d), and the first to distinguish such preemption from the raising of a FMVSS as a defense to a design defect claim. The *Wood* court described the manufacturer's burden in establishing preemption as follows:

> "To prove preemption, on the other hand, the manufacturer must show (1) that the theory of recovery advanced by the product liability suit is directed at the same 'aspect of performance' as that term is narrowly defined in *Chrysler v. Rhodes*, 416 F.2d 319 (1st Cir. 1969), as the federal safety standard, and (2) that the theory of recovery is of sufficiently general applicability that a successful tort suit would be equivalent to a state regulation." 865 F.2d at 417-418.

The *Wood* court concluded that, in the air bag context, the manufacturer had satisfied both prongs of its burden to establish preemption. The court was convinced that Congress's purposes, as revealed in the Safety Act and in the legislative history, plainly implied a preemptive intent. The court pointed out that the product liability claim before it alleging that the absence of an air bag

rendered the vehicle's design faulty would, if upheld, clearly "stand as an obstacle" to the regulatory scheme of the Safety Act. It was apparent to the *Wood* court that a state common law action sustaining the theory that a vehicle was defective because it lacked an air bag would, in effect, create a state safety standard related to the same aspect of performance as FMVSS 208, but not identical to FMVSS 208. As the *Wood* court concluded:

> "Such an action is, in our view, impliedly preempted because it would effectively circumvent section 1392(d)'s prohibition of nonidentical state standards covering the same aspect of performance as a federal safety standard." 865 F.2d at 402.

The court further elaborated that air bag regulation is preempted because it is addressed to "the same aspect of performance," no matter how narrowly one defines that term, as the federal regulation is addressed. The court noted that, by including passive restraints as an option for complying with FMVSS 208, the Safety Act had left no doubt that passive restraints are within the "aspect of performance" addressed by the federal standard. As the *Wood* court observed:

> "Furthermore, the history of FMVSS 208 shows irrefutably that passive restraints are within the 'aspect of performance' covered by the standard. All of the regulatory changes, lawsuits, and congressional actions have focused on the same question as that presented by [plaintiff's] lawsuit: Are seatbelts adequate to protect occupants in crashes, or are passive restraints required?" 865 F.2d at 409.

With regard to the second prong of the manufacturer's

burden to establish preemption set forth above, the *Wood* court cited this court's observation in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247, 79 S.Ct. 773 (1959), as follows:

> "[R]egulation can be as effectively exerted through an award of damages as through some form of preventative relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." 865 F.2d at 410.

The *Wood* court then concluded its analysis of regulation by damage awards as follows:

> "With respect to a claim that a vehicle is defective because it lacks air bags, however, it seems obvious that a damages award will have a pronounced effect on the manufacturer's future conduct. The same theory of recovery could be pursued by every front seat occupant injured in a multi-purpose vehicle. It is well known that injuries to front seat occupants are frequent; well over 20 lawsuits have been filed on theory of absence of air bags in the last two years. . . . In these circumstances, [defendant's] choice to avoid modification of its design 'seems akin to the free choice of coming up for air after being under water.' " 865 F.2d at 410-411.

The *Wood* court thus reached its determination that the plaintiff's air bag claim was preempted by federal law. The manufacturer in *Wood*, as well as respondents here, have unequivocally established that the theory of recovery advanced by petitioners is directed at the same aspect of performance as the federal safety standard, and that the theory, if successful, would be equivalent

to a conflicting state regulation. Petitioners' theory of defect therefore cannot stand.

The Tenth Circuit in *Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), like the Court of Appeal below, also came to the conclusion that *Wood* directly addressed and correctly resolved the issue before it as to preemption. However, in their petition for review to the California Supreme Court and in their petition here, the petitioners seek to argue that the Court of Appeal's determination was erroneous because *Wood* was "incorrectly decided" based on the grounds that "Congress could not have intended to nullify" "no air bag" claims because "it did not know [they] would ever exist," and because *Wood* "dispenses with the safety clause." (Petition, pp. 8-9.)

Perhaps the best answer to the petitioners' objection to *Wood* concerning the question of congressional intent may be found in a recent opinion filed by the Eleventh Circuit Court of Appeals, *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989). In *Taylor*, the Eleventh Circuit, like the First Circuit in *Wood*, determined that "no air bag" claims are impliedly preempted by federal law. 875 F.2d at 827. However, instead of focusing on what Congress contemplated in 1966 with respect to tort claims when it passed the Safety Act, the *Taylor* court began its implied preemption analysis "with the principle that federal law preempts state law when state law creates 'a potential frustration of the administrative scheme provided by [the federal law]' " or when a "state law 'interferes with the methods by which federal statute was designed to reach [its] goal.' " 875 F.2d at 825-826. The court then noted two important differences between the analysis employed in determining whether a state law or rule is expressly

preempted or whether it is impliedly preempted.

The first is that there is no strong presumption applicable in deciding whether a state law or rule conflicts with federal law, "in contrast to the strong presumption against preemption that we apply in determining whether the language of a federal statute or regulation expressly preempts state law." 875 F.2d at 826. With regard to the second difference, the court noted that "in implied preemption analysis it is possible to infer preemptive intent solely from effects." 875 F.2d at 826. As the *Taylor* court further observed:

> "Even where the preemptive intent behind the federal regulatory scheme is unclear from its statutory language or legislative history, the federal law nevertheless preempts the state law to the extent that the ordinary application of the two laws creates a conflict. *See Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union*, 468 U.S. 491, 501, 104 S.Ct. 3179, 3185, 82 L.Ed.2d 373 (1984). (Where there is an 'actual conflict' between federal and state law, the state law 'is preempted by direct operation of the Supremacy Clause.')" 875 F.2d at 826.

The *Taylor* court then analyzed the effect of allowing a plaintiff to pursue a state "no air bag" claim on the regulatory scheme passed by Congress, and specifically observed:

> "Consistent with Congress's 1974 mandate, the regulations promulgated under the Safety Act authorized automobile manufacturers to choose one of three different methods to comply with the safety standards for occupant crash protection; one of those federally

> approved options was the installation of manual seatbelts. *See* 39 Fed.Reg. 38,380 (1974). Congress subsequently endorsed the option authorized in the federal regulation by providing in 1978 and again in 1979 that '[none] of the funds appropriated [for the Department of Transportation] shall be used to implement or enforce any standard or regulation which requires any motor vehicle to be equipped with an occupant restraint system (other than a belt system).' " 875 F.2d at 826.

The Eleventh Circuit then acknowledged that, while the ultimate intent of Congress may be indiscernible:

> "[T]he effect of the regulatory scheme established by the 1974 amendment to the Safety Act and Safety Standard 208 is unmistakeable. It grants automobile manufacturers the option of complying with federal standards for occupant crash protection by installing manual seat belts instead of air bags." 875 F.2d at 827.

Thus, the petitioners' attack on the *Wood* decision with regard to Congress's intent at the time it passed the Safety Act is irrelevant to the ultimate conclusion of implied preemption of "no air bag" claims as reached by the courts in *Wood, Kitts, Taylor*, and the Court of Appeal below.

The petitioners' attempt to extend the reach of the general savings clause must be rejected. Section 1397(c) cannot, by itself, negate the application of implied preemption analysis, and cannot revive preempted state law which stands as an obstacle to the accomplishment of federal goals and objectives. *See, International Paper Co. v. Ouellette*, 479 U.S. 481, 494, 107 S.Ct. 805 (1987) (Congress certainly would not have "intended to

undermine this carefully drawn statute through a savings clause."); *Chicago & Northwestern Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 328, 101 S.Ct. 1124 (1981).

This Court has frequently found savings clauses inapplicable when the state remedy at issue would "be absolutely inconsistent with the provisions of the act." *Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446, 27 S.Ct. 350 (1907). In other words, "the act cannot be held to destroy itself." 204 U.S. at 446. The purpose of a savings clause is "not to nullify other parts of the act, or to defeat rights or remedies given by preceding sections, but to preserve all existing rights which were not inconsistent with those created by the statute." *Pennsylvania Railroad Co. v. Puritan Coal Mining Co.*, 237 U.S. 121, 129, 35 S.Ct. 484 (1915).

The petitioners' interpretation of the clause, which is that the FMVSS does not affect state common law, is clearly illogical and unsupported by the case law as noted above. As evidenced by *Wood, Taylor*, and the Court of Appeal below, the better reading of the savings clause construes it consistently with the rest of the Safety Act. Thus, the clause, as the appellate court in *Buccery v. General Motors Corp.*, 60 Cal.App.3d 533, 132 Cal.Rptr. 605 (1976), in effect determined, would then defeat the argument that compliance with FMVSS automatically exempts the manufacturer from liability for all safety defects. However, the clause would *not*, as the Court of Appeal below effectively concluded here, allow a state to define a tort standard or rule which would remove the element of choice specifically authorized in FMVSS 208 with respect to which occupant restraint system a manufacturer may use in a vehicle in order to comply with the requirements of

the Safety Act.

Contrary to the petitioners' unsupported and nebulous references to policy conflicts, the determination of the Court of Appeal below does not prevent the petitioners from pursuing their state law tort claims that the particular occupant restraint system with which the car was equipped was defective. Rather it prevents them from asserting a tort claim which is preempted by federal law, namely that the car should have been equipped with an air bag in addition to, or as an alternative to, the system selected by the manufacturer as explictly authorized by federal law. The result reached by the Court of Appeal below is entirely consistent with both California and federal law and policy. As the Court of Appeal below observed with respect to its determination:

> "To hold otherwise would be to allow a potential flood of actions against manufacturers that have been following the custom of industry and acting in compliance with federal regulations. The result would not only work a hardship to manufacturers, but also might so encourage litigation as to hamper the administration of justice." 212 Cal.App.3d at 982-983.

V.

Conclusion.

Because there is no "final judgment" as mandated by 28 U.S.C. section 1257(a), this Court should decline to consider the petition for writ of certiorari, as jurisdiction does not lie.

Alternatively, for the foregoing reasons, the petition should be denied.

Respectfully submitted,

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Attorneys for Respondents
NISSAN MOTOR CORPORATION IN U.S.A.,
NISSAN MOTOR COMPANY, LTD., and
OXNARD NISSAN

APPENDIX

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES **DEPT. WE-P**

DATE JANUARY 23, 1989 K. PAPPAS DEPUTY CLERK
HONORABLE LAWRENCE WADDINGTON JUDGE
HONORABLE JUDGE PRO TEM NONE Reporter
NONE Deputy Sheriff *(Parties and counsel checked if present)*

WEC 103437
MEIER, PAULA, ETC., ET AL.,
vs.
NISSAN MOTOR CORPORATION, ET AL.

Counsel for Plaintiff JOHN F. GERARD (No Appearance)

Counsel for Defendant HAIGHT, BROWN, BONESTEEL (No Appearance)

NATURE OF PROCEEDINGS.

DEFENDANTS' MOTION FOR SUMMARY ADJUDICATION OF ISSUES

IN THIS MATTER HERETOFORE TAKEN UNDER SUBMISSION ON 12-30-89 THE COURT RULES AS FOLLOWS:

MOTION DENIED.

AFTER READING MOVING, RESPONSIVE AND REPLY PAPERS, THE COURT CONCLUDES THAT THE FEDERAL STATUTE DOES NOT PRE-EMPT COMMON LAW REMEDIES. ALTHOUGH THE ISSUE IS NOT ALTOGETHER FREE FROM DOUBT, THE COURT CANNOT CON-

CLUDE AS A MATTER OF LAW THAT THE MOTION SHOULD BE GRANTED

COPY OF MINUTE ORDER SENT TO COUNSEL BY U.S. MAIL.

☐ IT IS STIPULATED that Commissioner _____ may hear this matter as Judge Pro Tem.

☐ TRANSFERRED TO/FROM DEPARTMENT _____
☐ Court disqualifies itself ☐ 170.6 CCP affidavit Filed

☐ OFF CALENDAR ☐ On court's own motion ☐ No Appearance
☐ At request of moving party ☐ By stipulation

☐ CONTINUED TO _____ IN DEPT. _____ AT _____ AM/PM

☐ On court's own motion ☐ Stip. to be filed
☐ On oral/written stipulation ☐ OSC Discharged
☐ REQUEST OF ☐ Moving party ☐ Respondent(s)
☐ Per Ex Parte Order of _____
☐ TRO to remain in full force and effect ☐ TRO dissolved

☐ MOTION: ☐ granted as prayed ☐ desired
☐ argued and taken under submission

☐ DEMURRER: ☐ sustained/ ☐ with/without leave to amend
☐ _____ days to amend/answer ☐ overruled

☐ JUDGMENT ☐ ORDER TO BE PREPARED BY: ☐ Clerk
☐ Moving party ☐ Responding party

☒ NOTICE: ☐ Waived ☐ By moving party ☒ By respondent(s)

☐ PETITIONER(S) IS/ARE SWORN AND TESTIFIES/TESTIFY

☐ PETITION IS GRANTED (AS AMENDED)

☐ DECREE IS SIGNED AND FILED.

WE--P
DEPT.

MINUTES ENTERED
1/23/89
COUNTY CLERK

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on February 1, 1990, I served the within *Brief of Respondents in Opposition to Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(By Express Mail: original and forty copies)

Clerk of the California
Supreme Court
3580 Wilshire Boulevard
Room 213
Los Angeles, California 90010

Clerk of the California Court
of Appeal
Second Appellate District
Division One
3580 Wilshire Boulevard
Room 301
Los Angeles, California 90010

Clerk of the Superior Court
County of Los Angeles
Hon. Lawrence Waddington
West District
1725 Main Street
Santa Monica, California 90401

David M. Harney
Thomas Kallay
Michael N. Friedman
HARNEY & PACKER
201 North Figueroa Street
Suite 1300
Los Angeles, California 90012

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 1, 1990, at Los Angeles, California.

Betty J. Malloy
(Original signed)